



# The Indiana Family and Social Services Administration

## Provider Training – Fair Labor Standards Act

November 10, 2014





## Changes to the Home Care Rule

- Effective January 1, 2015, direct care workers employed by agencies and other third party employers are entitled to receive at least the federal minimum wage and overtime pay.
- Direct care workers are workers who provide home care services, such as home health aides, personal care aides, caregivers and companions.





- If you are a home care agency or other third party employer, **effective January 1, 2015**, you are required to pay at least the federal minimum wage and overtime pay to any direct care worker you jointly or solely employ, regardless of the worker's duties.
- Also **effective January 1, 2015**, agencies and other third party employers may no longer claim the overtime pay exemption for live-in domestic service workers.





## Minimum Wage Standards

- The federal minimum wage is currently \$7.25 an hour, though many states have their own minimum wage laws. When a worker is protected by both state and federal minimum wage laws, the worker is entitled to the higher minimum wage.
- Indiana's minimum wage is also \$7.25 an hour, so there is no expectation of a higher wage.





## Overtime Compensation

- Workers who are covered under federal overtime pay protections must be paid at a rate not less than one and one-half times their regular rate of pay after 40 hours of work in a workweek.







## What are “Hours Worked”

- Generally, when an employee is “on duty” (that is they must be in the home and prepared to provide services when required), they are working.
- For example, a home health aide who must watch over an ill patient, a driver who must be at the home and ready to drive when directed, are on duty and must be paid for all of that time.
- Under the FLSA, an employee who reads a book, knits, or works a puzzle while awaiting assignments is working during the period of inactivity. In such cases, the employee is “engaged to wait” and must be paid for such time.





## **“Hours worked” cont.**

- On the other hand, direct care employees (including live-in employees) who have been completely relieved from duty and are able to use the time for their own purposes—to go to a movie, run a personal errand, attend a parent-teacher conference— need not be paid for this time.
- For example, a live-in care provider who assists her roommate who has a disability in the morning for three hours, then goes to class at the local university, returns home to study, watches television, and does her own laundry before assisting the roommate for two hours in the evening, has only worked five hours; the hours spent actually engaged in assisting the roommate who has a disability is deemed to be compensable hours worked.





## Live-In Caregivers

- A live-in domestic service employee is an employee who provides domestic services in a private home and resides on his or her employer's premises on a "permanent basis" or for "extended periods of time."
- Employees who work 24-hour shifts are not necessarily live-in domestic service workers.







- An employee who works on the employer's premises is not necessarily considered working all the time he or she is on the premises.
- Example: Wendy is employed as a live-in domestic service worker for Mr. White. Wendy and Mr. White have an agreement that she will provide assistance with toileting, bathing, dressing, preparing breakfast and transportation to Mr. White's workplace. This normally takes 2.5 hours depending on traffic to Mr. White's office. Mr. White is at work from 9:00 am to 4:00 pm, and Wendy is not required to remain with Mr. White. In fact, Wendy goes to another part-time job at the grocery store. At the end of Mr. White's workday, Wendy transports Mr. White to his home, prepares dinner for him and cleans up afterward before assisting Mr. White as he retires for the evening. This normally takes 4 hours. Wendy's compensable hours worked in this scenario are 6.5.





## Another Example

- William lives with his uncle, Ms. Jones, who has a physical disability. William is employed to tend to his basic needs—preparing meals and feeding her, bathing, dressing, and administering medications. William spends 6 hours a day performing these functions and otherwise is free to leave the residence and to use the remainder of his day as he sees fit. William's hours worked are the 6 hours he spends preparing meals, feeding, bathing, and administering medications to his cousin, Ms. Jones.





## Hours Worked When On Duty < 24 Hours

- If an employee is required to be on duty—that is, either performing work duties or engaged to wait—for less than 24 hours, the employee must be paid for all hours even though he or she is permitted to sleep or engage in other personal activities when not busy.
- However, if an employee is completely relieved from duty, is able to use time effectively for his or her own purposes, and is permitted to leave the employer's premises, the time is not compensable.





## Hours Worked When On Duty > 24 Hours

- If an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide sleeping period of not more than eight hours from work time, as long as adequate sleeping facilities are furnished by the employer and the employee can generally enjoy an uninterrupted sleeping period.
- Example: Ernest works as a domestic service worker and is scheduled to be on duty for a 36-hour period to care for Mr. Honeycutt. Ernest has an agreement to exclude his meal periods (two thirty minute periods) and eight hours of sleep time from his compensable time. Ernest is released from duty at the end of the 36 hours. During the duty time, Ernest spends eight hours sleeping uninterrupted. Ernest must be paid for 27 hours.





## Travel Time

- An employee who travels from home to work and returns to his or her home at the end of the workday is engaged in ordinary home-to-work travel.
- Normal travel from home to work and back is not work time.
- This is true whether the employee works at a fixed location or at a different location each day.







## Travel Time (cont.)

- Travel that is all in a day's work, however, is compensable hours worked.
- Example: Barbara drives Mr. Jones to the Post Office and grocery store during the workday. Barbara is working and the travel time must be paid.
- Travel from job site to job site during the workday, such as travel between several clients during the workday, is compensable hours worked. The employer is responsible for ensuring that travel time from job site to job site is paid.





## How to Calculate Overtime

- Unless specifically exempted, employees covered by the Act must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay.
- There is no limit in the Act on the number of hours employees aged 16 and older may work in any workweek.
- The regular rate of pay cannot be less than the minimum hourly wage, regardless of how it's paid (daily rate, piece rate, etc.).





- OT is figured on a workweek basis.
- A workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day.
- Averaging of hours over two or more weeks is not permitted.
- OT pay is is calculated by dividing the total pay for employment in any workweek by the total number of hours actually worked.





## **FLSA Application to Independent Contractors in Home Care**

- Workers who are independent contractors, meaning they are in business for themselves rather than economically dependent on an employer, are not employees and do not have to be paid according to the requirements of the Fair Labor Standards Act.
- DOL using the “Economic Realities” test to determine if somebody is an employee or an independent contractor.
- If third-party employer is present, most home care workers will be deemed employees, not contractors.





## Family Members as Paid Caregivers

- Although a paid family care provider can be an employee under the FLSA, the DOL has determined that the FLSA does not necessarily require that, once a family or household member is paid to provide some home care services, all care provided by that family or household member is part of the employment relationship.
- In such programs, the DOL will usually not consider a family member with a pre-existing close, personal relationship with the consumer to be employed beyond a written agreement developed with the involvement and approval of the program and the consumer (or their representative), usually called a plan of care.







## **Paid Family Caregivers (cont.)**

- The plan of care will define the employment relationship if it is "reasonable,"
- Reasonable means that it treats a family or household member selected as a paid care provider in the same way it would a paid care provider who is not a relative or household member of the consumer. This determination includes consideration of whether the plan of care would have included the same number of paid hours if the care provider had not been a family or household member of the consumer.





## Companionship Services, defined

- The Final Rule defines "companionship services" as the provision of fellowship and protection and explains that "companionship services" may also include the provision of care *if* the care is provided attendant to and in conjunction with the provision of fellowship and protection *and* does not exceed 20 percent of the total hours worked per person and per workweek.





## Fellowship & Protection

- "Fellowship" means to engage the person receiving services in social, physical, and mental activities.
- "Protection" means to be present with the person receiving services in his or her home or to accompany the person when outside of the home to monitor the person's safety and well-being.
- Examples of fellowship and protection may include: conversation; reading; games; crafts; and accompanying the person on walks, on errands, to appointments, or to social events.





# Questions?

<http://www.dol.gov/whd/homecare/>

